No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Petitioner Maryland-National Capital Park and Planning Commission (the "Commission"), an agency created under Maryland law that administers a regional system of parks in two of Maryland's counties,[2] owns and maintains the World War I memorial at issue in this case. Maryland has a longstanding interest in respecting and preserving the reserved property rights of the American Legion in the monument while ensuring that the Peace Cross, an historic memorial that honors members of the military from Prince George's County, Maryland, is properly maintained in a manner that ensures public safety.

SUMMARY OF ARGUMENT

I. This case illustrates—and provides the Court an opportunity to resolve—the dilemma states face when aging historic monuments that contain an arguably religious element require state support to mitigate a threat to public safety. No one disputes that the Peace Cross has been badly damaged by the passage of time, and that the Commission's only interest in the property is ensuring the monument's maintenance. When private monuments become a danger to public safety, states need flexibility to act without fear of

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[1] The State of Maryland submits this brief under Supreme Court Rule 37.4.

[2] *See* Md. Code Ann., Land Use Title 15, subtitle 1 (LexisNexis 2017).

being held to have violated the Constitution. The Court should confirm that states' options in such circumstances are not limited to destroying aging monuments, thereby communicating disrespect to the message conveyed by private memorials.

II. The Court should also confirm that in Establishment Clause cases, the practical realities of how a property is used must be given weight. The Peace Cross began as a private monument, and even after the Commission took title to it, its private owners have enjoyed rights similar to those of actual ownership, whereas the Commission has no involvement with the property other than ensuring its upkeep. This Court's Establishment Clause cases recognize the importance of context and public perception in evaluating whether a governmental action constitutes an endorsement of religion, and the Court should clarify that when private parties retain substantial involvement in the use of a monument, the Establishment Clause does not prohibit states from overseeing the monument's upkeep.

ARGUMENT

I. The Court Should Clarify That States Are Not Required to Purge Their History as Monuments Age and Require Maintenance.

States require flexibility to balance competing interests when historic preservation and public safety collide. This is not a case in which a state built a

religious monument on public land; rather, it is a case in which a state assumed care of an aging monument only after it had become an established icon in the local community. This Court's Establishment Clause jurisprudence must allow states to provide secular support to structures like the Peace Cross, or else those memorials and the message they convey may become lost to time.

No one disputes that the Commission's sole motivation for acquiring title to the Peace Cross site was to keep it in good repair. The Peace Cross was built by private parties on private land, and by the time the Commission acquired the site, the monument had begun to badly decay, creating a risk to public safety. The 40-foot-tall monument towers over "a traffic island taking up one-third of an acre at the busy intersection of Maryland Route 450 and U.S. Route 1," Pet. App. 8a, and it has begun to fall apart. It has developed deep cracks, its reinforcements are corroding, and it is swelling outward. J.A. 739-49. At the same time, the Cross, and its message of tribute to locals who gave their lives for their country, have become a cherished part of the community's historical fabric. Thus, the Peace Cross presented a true conundrum: Should Maryland ignore a public safety hazard, risk violating the Establishment Clause by assuming responsibility for the monument's maintenance, or extinguish the Cross's message by demolishing it?

This case presents an opportunity for the Court to resolve the "dilemma" it identified when governments cannot "maintain [a] cross" without violating the

Constitution, but cannot "remove the cross without conveying disrespect for those the cross was seen as honoring." *Salazar v. Buono*, 559 U.S. 700, 716 (2010). Although *Salazar* gestured toward the difficult choice historic monuments with religious elements can pose for states, the Court left open the question of what options states have to deal with that choice. The Court should resolve the question that *Salazar* left unanswered, or else states will continue to find their efforts at historic preservation subject to constitutional challenge. *See American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 290 (6th Cir. 2009) (holding that Detroit did not violate the Establishment Clause by including churches in a revitalization program that allowed private properties to receive municipal reimbursements for exterior refurbishments); *Taylor v. Town of Cabot*, 178 A.3d 313, 323 (Vt. 2017) (relying on *American Atheists* to uphold town's decision to award grants to historic churches for repairs).

Now that the question is squarely presented, the Court should hold that the Establishment Clause allows states to ensure the safety of historic monuments that are valued by local communities, even if those monuments contain an allegedly religious element.

II. An Establishment Clause Inquiry Must Take Account of Unique Private Interests in Monuments with a Religious Element.

The Court should also clarify that when a private entity acts as the de facto, if not de jure owner of a

monument, the entity's use of the property must be considered as part of any Establishment Clause inquiry. Although today legal title to the Peace Cross site is held by a state governmental entity, the cross's original private owners continue to enjoy substantial interests in it that should be given legal weight.

It was understood that the Commission was acquiring the property solely to "assume the obligation of maintaining, repairing and otherwise caring for said Cross and the land upon which it is erected." J.A. 1386. After title passed to the Commission, the American Legion continued to use the monument as if it were the owner, and today uses the site to hold memorial services and ceremonies. Pet. App. 60a. The transfer of ownership to the Commission came with the understanding that the American Legion retains the right to use the site and would be notified if the Cross were to be removed from the Commission's jurisdiction, so that it could "make arrangements for the care and maintenance of the Cross and the surrounding parcel." Pet. App. 60a; J.A. 1386. By comparison, despite being the legal owner of the property, the Commission has not used it for any purpose; indeed, "[t]here is no evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events" or "that the Commission is required to be involved in any church-related activities to maintain the Memorial." Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part).

The Court should clarify that this context matters, and that when a monument looks like private property

and is used like private property, the Constitution does not prohibit a state from becoming the property's custodian solely to ensure the monument remains safe. Nor should the formalities of legal title override public perception of whether a monument constitutes government endorsement of religion. It is an essential tenet of the Court's Establishment Clause jurisprudence that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *see also, e.g.*, *id.* at 679 (majority opinion) ("[T]he focus of our [Establishment Clause] inquiry must be on the [display] in . . . context[.]"); *id.* at 690 (O'Connor, J. concurring) (analogizing government religious displays to statements and noting the importance of judging intent by "examining the context of the statement"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (noting that a reasonable observer in Establishment Clause cases must be "deemed aware of the history and context of the community and forum" in which the speech takes place (quoting *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment))).

In context, the Peace Cross very much remains the American Legion's monument, and the Commission's involvement in supporting its maintenance does not violate the First Amendment. The Court should confirm that a private entity's substantial interests in a

property are a relevant factor that weighs against finding an Establishment Clause violation.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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